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No. 94-341

In The

Supreme Court of the United States

October Term, 1994

TOUCHE ROSS & CO.,

Petitioner,

v.

CONGREGATION OF THE PASSION,
HOLY CROSS PROVINCE,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a writ of certiorari may be granted where the alleged federal questions are raised for the first time in the United States Supreme Court, were never "pressed" by petitioner in the state's highest court and were never "passed upon" by the state's highest court?

(2) Whether certiorari may be granted based upon the claim that the state's highest court failed to apply federal common law where the petitioner took a different position in the state's highest court and requested that it apply the state's substantive law and not federal common law?

(3) Whether a reviewable issue is raised by petitioner's assertion that a state's highest court erred by applying its own law on the issue of the collateral estoppel effect to be given to a prior federal adjudication, when the law applied by the state's highest court is the same as the federal common law?

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JURISDICTION

Petitioner has correctly stated the grounds on which it seeks to invoke the jurisdiction of the Supreme Court. Respondent asserts the Court lacks jurisdiction to grant the requested writ since the constitutional issues raised in the Petition were not "pressed or passed upon below." *Webb v. Webb*, 451 U.S. 437, 4 39 (1981).

STATEMENT OF THE CASE

This case presents the Court with a unique set of factual and procedural circumstances. The uncommon nature of these circumstances, as discussed below, make this case unsuitable for certiorari review as they take the case out of the commonplace and present the Court with issues devoid of common appeal or application.

This Petition arises from a state court case which alleged accounting malpractice and breach of contract under Illinois common law. Following a four week jury trial in the Circuit Court of Cook County in 1988, the jury rendered a verdict in favor of the plaintiff, Congregation of the Passion, Holy Cross Province ("the Congregation")[1] and against its former independent accounting firm Touche Ross & Co. ("Touche Ross") finding it liable

[1] The Congregation of the Passion, Holy Cross Province, is an Illinois not-for-profit corporation with no parent or subsidiary corporations. The priests and brothers who comprise the Congregation are members of the Passionists, an order of the Roman Catholic Church. Touche Ross has correctly stated its status in the Petition for Certiorari.

for accounting malpractice/negligence and breach of contract. A count alleging breach of fiduciary duty was dismissed by a directed verdict. Judgment was entered in the amount of $3,819,352, plus costs.

The claims against Touche Ross involved malpractice – spanning a five year period – relating to the values Touche Ross reported to the Congregation of U.S. Government Bonds, purchased for the Congregation by a San Francisco investment adviser, Cranford D. Newell ("Newell"). Initially, the Congregation filed suit in federal court against Newell and four bond dealers alleging violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Touche Ross was alleged to have aided and abetted Newell and the bond dealers' 1934 Act violations, and the Congregation also asserted pendant common law claims for accounting malpractice and breach of contract. On motions for summary judgment on the federal security law claims only, the federal district court held that the Congregation could not prove a Rule 10b-5 violation against the dealers or Newell. There being no primary securities law violation, an aiding and abetting claim against Touche Ross could not survive. (App. C-4,5).[2]

Touche Ross thereupon requested the district court to dismiss *without prejudice* the pendant state laws claims against it, the district court did so, and the Congregation re-filed those claims in the Circuit Court of Cook County.

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[2] For the purpose of consistency, the Congregation will use the same references to trial exhibits, the Report of Proceedings and the record on appeal that were used by Touche Ross in its Petition. References to documents appended to the Petition for Certiorari will be to "App. ___-___."

None of these claims (i.e., accounting malpractice/negligence, breach of contract and breach of fiduciary duty) had been litigated, considered, or ruled upon by the federal courts.

In a motion to dismiss filed in state court, Touche Ross argued that the prior federal litigation acted to preclude the Congregation from relitigating specific factual issues which it claimed created an insurmountable defense, on the basis of *Illinois* collateral estoppel principles. The trial court denied the motion to dismiss and a subsequent summary judgment motion, a directed verdict motion and post-trial motions, all asserting that Illinois substantive collateral estoppel principles prevented the Congregation from pursuing its common law claims against Touche Ross. Touche Ross then appealed to the Illinois Appellate Court on a variety of grounds, including assigning as error the trial court's failure to give collateral estoppel preclusionary effect to certain alleged factual "findings" of the federal courts. However, Touche Ross did not raise any constitutional issues in the Illinois trial or Appellate Court, and urged the Appellate Court to employ the *substantive law of Illinois* relating to the application of collateral estoppel. (Ill. App. Ct. Brief filed Aug. 28, 1989 at p. 27).

At both appellate levels, Touche Ross failed to raise any constitutional issues, and argued that the application of the collateral estoppel argument was governed *by the law of Illinois*. (*Id.*; Ill. Sup. Ct. Brief filed May 5, 1992, at p. 39, f.n. no. 20). In the Illinois Supreme Court, though failing to raise *any* constitutional issue regarding collateral estoppel, Touche Ross did make an argument relevant but contrary to its position as stated in its Petition.

Touche Ross urged the Illinois Supreme Court *not to reach any United States constitutional implications raised by its collateral estoppel arguments and to rely solely on Illinois law to determine whether the prior federal decisions collaterally estopped the Congregation from pursuing its state law claims against Touche Ross.* As Touche Ross stated in its opening brief in the Illinois Supreme Court:

> The issue here is ultimately of constitutional dimension for the constitutional judicial power of the United States, the necessary and proper clause and the Supremacy Clause require that state courts give full faith and credit to the judgments of the federal courts and this extends to the collateral estoppel effects of those judgments . . . *But the constitutional issues need not be reached since the proper legal principle is found in Illinois law itself and requires reversal of the judgment below.*

Ill. Sup. Ct. Brief Filed May 5, 1992, at p. 39, n. 20 (emphasis added).

The Petition filed in this Court marks the first time Touche Ross has asserted that *any* constitutional issues related to collateral estoppel should be considered by *any* tribunal. Moreover, before the Illinois courts Touche Ross consistently asserted that Illinois law governed the collateral estoppel issues, *not federal law.*

A. The Congregation and its Investments

The Congregation is a Roman Catholic religious order which derives its operating budget from donations and from investment income. The priests and brothers of

this religious order have no formal training or background in investments or accounting, and thus hire and rely upon outside investment specialists to manage their funds and on outside accountants to accurately report the results the fund managers achieve. (R.P. 718-19; 2643-44).

Touche Ross had, beginning in 1973, been engaged by the Congregation to conduct a review of its financial records, and to prepare its financial reports. Each year the parties mutually executed an engagement letter. Touche Ross agreed each year to determine the market value of the Congregation's investments and represented in each financial statement that it prepared for the Congregation that the Congregation's investments were reported at market value. (P.X. 3,4,5,6, 44-49 at Note A(2) (Investments)).

In 1976, Touche Ross encountered for the first time an investment portfolio of U.S. Treasury bonds managed by Newell. (R.P. 1282-83). The Congregation had committed $2.0 million to Newell's management. (R.P. 1069). The Congregation provided Touche Ross with each confirmation and statement sent by the dealers, and separate transaction statements sent by Newell – in short, everything needed to identify each security held and its market value. (R.P. 1540-41, 1696, 1702; P.X. 128M).

B. The Role of Touche Ross and its Misstatements to the Congregation

The Touche Ross accountants conducting the 1976 review established that although only $2 million had been placed under Newell's management, the face value of the bonds held or sold short at June 30, 1976 was $44.5

million. (P.X. 12). That 22:1 leverage was made possible by practices employed by government securities dealers which permitted a purchase of one bond issue to be set off against the short sale of another, passing market risk on both issues to the customer but calling for only minuscule cash transfers. (R.P. 1325-26; 1535-36). Another method for transferring market risk with virtually no cash changing hand was the repurchase agreement ("repo").

The Congregation's bookkeeper, Brother Kent, who was a member of the order, had been doing his best to record on spread sheets all of the information he was receiving on the transactions that led to the $44.5 million open positions. (R.P. 1687, 1701-05). Despite having exposure to this information, Brother Kent had no understanding of its meaning or its relevance to the value of the Congregation's investments. (R.P. 1689-96, 1701-05). Nor did Brother Kent have any idea how such positions should be reported in financial statements – he was waiting for Touche Ross to advise the Congregation on the correct way to determine the value of these investments and how such value should be reported on the statements Touche Ross had undertaken to prepare. (*Id.*)

The Touche Ross accountants appear to have been as bewildered as Brother Kent was. They told the Congregation they would discuss the issue with senior management at Touche Ross and would come back with a recommendation. (R.P. 1702-05). Touche Ross decided the method to present these investments in financial reports. (App. E-4). The method it chose led to disastrous results.

Touche Ross determined that the "investment" consisted of the amount of cash the Congregation paid at inception to settle the spread, or to put the repo in place. This advice was based on a note written in the Touche Ross 1976 work papers, which was never made known to the Congregation until produced during discovery.[3] The

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[3] That note stated:

"3) Arbitrage – when Newell determines that there is a temporary fluctuation in the price of a government security in relationship to other government securities he buys or sells short that security and purchase [sic] or sells short another government security at the same time. When the fluctuation is eliminated he reverses his previous purchase and short sale and takes a profit (or loss). These arbitrages are generally for over $1 million dollars [sic] and a small fluctuation (1/32 of 1%) can involve a substantial amount of money. The only money actually invested by the Congregation is for margin required by the dealers (typically the amount of the purchase less the amount of the short sale). The risk is minimized since only U.S. government securities are traded and the chance of default is small.

At June 30, 1976 the Congregation had open arbitrages aggregating $22.25 million at par value and short positions in the same amount. Since the trades in these securities involve minor fluctuations in price (1/32 or even 1/64 of a point) and there is no source which can tell us market value closer than 1 point ($222,500) it was decided not to gross up the balance sheet to reflect these items at market.

Instead footnote disclosure will be made of the total amounts involved and only the margin outstanding on these arbitrages will be included in investments.

W. Cornfield
10/4/76"

(PX 1; App. A-3)

effect of reporting these investments as Touche Ross decided to report them is that the Congregation would never know the market value of any bond holding in the Newell managed accounts that remained open at the end of a fiscal year. Any unrealized losses or gains occurring due to fluctuations in market prices would not be reflected in the figures which were reported in the annual financial reports prepared by Touche Ross. (App. A-3). Touche Ross believed – incorrectly as it turned out – that the values it reported were essentially equal to market values. (P.X. 78, 93, p.7; R.P. 1970, 2695-96).

The relationship of the Congregation to Newell could have been terminated at any time for any reason including that the adviser's investment decisions were causing significant losses of the investment capital under his management (R.P. 2663-66). Touche Ross was to confirm the accuracy of profit/loss figures derived from Newell's reports, including the market value of the portfolio on a yearly basis. Every engagement letter from 1976 through 1980 declared, "[i]nvestment market values will be tested by reference to published market quotations" (P.X. 3,4,5,6). No such testing was ever conducted by Touche Ross. (R.P. 1296-7; 2026-28). Due to its faulty assumptions as contained in the Cornfield note and its lack of testing, Touche Ross *overstated* the value of these investments in ever-increasing amounts from $214,000 in 1976 to $2,400,000 in the draft report sent to the Congregation in September 1980. (App. A-4,5).

The difference between reporting these investments as Touche Ross did, and at market value, as it agreed to do, was:

Fiscal Year	Value Reported By Touche Ross	Actual Market Value	Unreported Losses on Financial Stmts Prepared By Touche Ross
1976	$2,166,322	$1,951,520	($214,802)
1977	1,795,346	1,471,720	(323,626)
1978	1,792,748	319,861	(1,472,887)
1979	2,226,014	878,638	(1,347,376)
1980 (Draft)	3,706,190	1,286,410	(2,419,780)

(App.A-5,7; B-9).

The 1980 draft report showing a portfolio with $3.7 million was delivered in September. (P.X.48). The following month the engagement partner at Touche Ross asked one of the junior accountants where the $3.7 million was. No one could answer. (P.X. 94, R.P. 1840-42). Between October, 1980 and April, 1981, Touche Ross learned that the values it had been reporting on the financial statements it prepared for the Congregation were grossly overstated, but it did not so inform the Congregation until April 1981. (R.P. 2682). A final 1980 report (replacing the draft report) was dropped off at the Congregation late in April, 1981 with no explanatory letter and with no one offering to explain five years of errors. (R.P. 2747-48). Shortly after receiving the final 1980 financial report – which also restated the previously reported values of the Newell investments for the prior three years – the Congregation closed its accounts with Newell. (App.A-7; R.P. 777; P.X. 49, note H).

C. The Federal Litigation

The Congregation's federal court action against the bond dealers was based solely upon alleged violations of Section 10(b) and Rule 10b-5. The federal claim asserted against Touche Ross was for aiding and abetting those primary securities laws violations. The district court granted summary judgment in favor of the bond dealers, and the Seventh Circuit affirmed, basing its ruling on *O'Brien v. Continental Illinois Nat'l Bank & Trust Co.*, 593 F.2d 54, 60 (7th Cir. 1979). (App. C-5,6). By delegating full discretionary authority to Newell, it was held that the Congregation retained no investment decision, and that denial of information to it could not be "in connection with the purchase or sale of a security" as required by this Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975). (App. E-7,8). With respect to Touche Ross, the Seventh Circuit merely found that there could be no claim against it for aiding and abetting, without a primary violation on the part of the dealers. (App. E-11,12).

The common law counts against Touche Ross were dismissed by the federal district court, *without prejudice*, and were not ruled upon. There was no occasion for either federal court to make any findings relating to the pendant claims because dismissal of the securities laws claims eliminated the basis for federal jurisdiction. In fact, Touche Ross argued successfully that the state law claims should not be considered:

> It would be inappropriate to address their merits in this forum because once a plaintiff's federal claim is dismissed, pendant state law claims should also be dismissed.

(C. 1190).

The federal district court agreed that it would not address issues other than aiding and abetting as to Touche Ross, and it did not do so. The federal district court specifically held that these issues were to be resolved by the state court:

> The only federal claim lodged against Touche, Ross is also premised on the aiding and abetting theory. My earlier discussion regarding *O'Brien* and the lack of primary violation, also precludes a finding of liability against Touche, Ross.
>
> Additionally, there is no evidentiary basis to conclude that Touche, Ross aided or abetted Newell in anything he did, let alone a securities fraud scheme.
>
> The remaining claims are all state law causes of action. Because this court is one of limited jurisdiction, and a state court could easily preside over the remaining issues, I will decline to exercise pendant jurisdiction over these matters and hereby dismiss them.

(App. C-6).

D. The State Court Trial and Appeals

After the dismissal of the common law claims, the Congregation re-filed them in state court. In the trial court, Touche Ross repeatedly sought to prevent a decision on the merits of the malpractice and breach of contract claims, asserting that alleged "findings" of the federal courts relating to the resolution of the federal claims collaterally estopped the common law claims. (C. 10348-58, 11373-416, 11780-82, 11785-86). In its various motions filed before the trial court, Touche Ross argued

the application of Illinois law to determine the collateral estoppel effect, if any, of the alleged "findings" of the federal courts. No federal constitutional issues were raised with the trial court.

The Illinois Appellate Court was next urged to give collateral estoppel effect to the purported "findings" of the federal courts. (Brief of Touche Ross filed August 28, 1989 at 25-35; Reply Brief of Touche Ross filed December 6, 1989 at 11-16.) Touche Ross failed to raise in the Appellate Court any of the constitutional issues asserted here. Again, its collateral estoppel argument in the Appellate Court rested solely on the substantive law of Illinois, and not on federal issue preclusion principles.[4] Collateral estoppel was held not to apply because no determination on the merits of the state law claims asserted by the Congregation was ever sought by Touche Ross, or was ever made by a federal court. (App. B-16,17). As the Appellate Court stated, "the first time a trier of fact ever considered evidence on the issues of proximate cause and knowledge or other factors pertaining to Touche Ross' purported negligence and breach of contract was at the trial below." (App. B-16). The Appellate Court relied on many of the state court cases cited to it by Touche Ross.

The Illinois Supreme Court next considered the refusal of the lower courts to give collateral estoppel

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[4] For example, in the first subsection of its collateral estoppel argument in its opening brief in the Appellate Court, Touche Ross stated that, "[t]he Illinois Supreme Court has held that the 'only pertinent questions' for the application of collateral estoppel are . . . " and cited to *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113, 499 N.E.2d 1373, 1375 (1986).

effect to the "findings" allegedly made by the federal courts. Touche Ross again failed to raise any of the constitutional issues raised here. Contrary to the position Touche Ross now takes, it implored the Illinois Supreme Court to avoid potential constitutional issues, and to rely solely upon the substantive law of Illinois: *"[b]ut the constitutional issues need not be reached since the proper legal principle is found in Illinois law itself and requires reversal of the judgment below."* (Ill. Sup. Ct. Brief of Touche Ross filed May 5, 1992 at 39, n.20).

Like the lower state courts, the Illinois Supreme Court correctly recognized that the prior federal opinions would, in the proper circumstances, collaterally estop common law causes of action asserted by the Congregation. The Illinois Supreme Court did not, as Touche Ross claims, "disregard a decree of a court of the United States." (Pet. at 2). Rather, the Illinois Supreme Court recognized the prior federal rulings and carefully analyzed their potential collateral estoppel effect. The court then decided that the "findings" alleged by Touche Ross to have been made by the federal courts were not sufficient to collaterally estop the Congregation from pursuing its malpractice and breach of contract claims against Touche Ross.

In so finding, the Illinois Supreme Court first held that collateral estoppel did not apply to findings made by the federal court that were not relevant to plaintiff's negligence and breach of contract claims, because factual findings as to Newell's relationship with the Congregation "have no bearing on whether [Touche Ross] is liable to [the Congregation] for the manner in which [Touche

Ross] recorded the Newell investments in [the Congregation's] financial report." (App. A-12). The Illinois Supreme Court next determined that many of the "points urged by defendant as findings *were not actually decided* in the Federal adjudication" or were "taken out of context" by Touche Ross. (App. A-12,15) (emphasis added). After careful analysis, the Illinois Supreme Court also found that certain claimed preclusive findings of the federal courts were "not necessary" to the federal decisions. (App. A-13).

For the first time, in the introduction to its Petition for Rehearing, Touche Ross suggested that there were relevant constitutional implications to the Illinois Supreme Court's failure to give collateral estoppel effect to the purported federal court findings. (Petition for Rehearing of Touche Ross filed on May 12, 1994 at 3). However, in the argument section of its Petition for Rehearing, Touche Ross failed to press any constitutional arguments, and similarly failed to urge, as it does now for the first time here, that the Illinois Supreme Court should have applied federal rather than Illinois preclusion principles. Since these issues were never properly raised before the Illinois Supreme Court, they were never ruled upon, either in its original ruling or in its denial of Touche Ross' Petition for Rehearing.

E. Misstatements of Fact in Petition

There are several material misstatements repeatedly made in the Petition which have a significant bearing on the question of what issues would properly be before the Court if certiorari were granted. Touche Ross repeatedly

claims that the federal courts found that it made no misrepresentations to the Congregation. (See Pet. at 6, 7, 14, 20, 21, 22, 27 and 28). Neither the district court nor the Seventh Circuit ever made such a finding. Touche Ross' claim that the Seventh Circuit determined that there was no evidentiary basis from which to conclude that it had made "misrepresentations" to the Congregation is pure fiction. It is true that the district court and the Seventh Circuit found the dealer defendants made no misrepresentations to the Congregation upon which a primary federal securities fraud claim could be based. (See App. C-3,5; E-8). It is equally clear from the context in which these findings were made that they relate to the dealer defendants and not to Touche Ross. Also, the federal courts never found that the Congregation did not rely upon Touche Ross or the misrepresentations contained in the reports created by it as claimed by Touche Ross. (Pet. at 23).

Touche Ross also inaccurately claims the federal court determined that a "joint decision was made" between the Congregation and Touche Ross on the method of reporting the investment in the financial statements. (Pet. at 4; See also Pet. at 21, 24, 27). No such agreement was ever found by the federal courts. Touche Ross also states that "Touche Ross had consulted with the Congregation concerning the reporting of the investments and it *was* decided to report the investments at cost" (emphasis added). (Pet. at 7; See also Pet. at 29). No such findings were ever made by the federal courts. The actual quote from which these misstatements are taken states that, "[w]hile preparing the 1976 report, Touche Ross consulted with the Congregation and decided to

report the arbitrage investments on a cost basis." (App. E-4). A natural reading of this statement suggests that Touche Ross made the reporting decision on its own. Such a conclusion makes sense in the context of the relationship between the Congregation and Touche Ross – the Congregation had hired the independent accounting firm of Touche Ross to make exactly this type of decision because the Congregation lacked the expertise to do so. Touche Ross' strained reading of this statement and its inclusion of the word "was", which is not found in the Seventh Circuit's opinion, confirms the misstatement.

Touche Ross also misstates the Seventh Circuit's opinion when its states, "the Business Advisory Board ("BAB")[5] monitored the Newell arbitrage activities, as did the Congregation's own officers." (Pet. at 4). There was no such finding made by the Seventh Circuit. The only reference on the page cited by Touche Ross for this proposition is a reference to the finding that the BAB had a consultant look at the Newell investments and that the consultant determined they were risky. The federal courts never found, as Touche Ross suggests in its Petition, that the BAB or the Congregation knew the true value of the Newell managed funds, or the extent of their losses, until Touche Ross finally informed them in 1981.

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[5] The BAB consisted of laymen who volunteered to meet when asked to do so with the Congregation's governing council. No member of the BAB had any experience with government bond dealers' trading practices.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There is nothing presented by this Petition that makes this case appropriate for review. *First*, by failing to raise the purported constitutional issues in the Illinois Appellate or Supreme Courts and by seeking to raise them for the first time in its Petition, Touche Ross has failed to meet the "passed and pressed upon below" rule which is an essential prerequisite to this Court's ability to grant a Petition. *Second*, since Touche Ross urged the Illinois Supreme Court to apply the substantive law of Illinois to determine the collateral estoppel effect of the prior federal adjudication, it cannot now argue that the court erred by failing to apply federal preclusion principles. *Third*, there is no federal law question raised on which any conflict has developed, either between federal circuits, among state supreme courts, or between the Illinois Supreme Court and governing Supreme Court precedent or a decision of a federal appeals court. *Fourth*, the outcome of the case below would not have been altered had the Illinois Supreme Court applied the federal common law now advocated by Touche Ross. This is so because (1) Illinois collateral estoppel law is generally more favorable to Touche Ross' position than federal law, and (2) the Illinois Supreme Court in fact applied the elements of federal common law anyway. *Fifth*, the novel and complex procedural and factual circumstances involved in this case make it inappropriate for certiorari review because any decision based upon it would lack general application. The Illinois Supreme Court's opinion rejecting collateral estoppel in the unique context presented here does not present an important issue of federal law, nor does it portend significant practical

consequences. This case simply does not present any issues of general public concern.

I. Certiorari Should Not be Granted Since the Constitutional Issues Raised in the Petition Were Not Pressed and Passed Upon Below

This is the first time Touche Ross has asserted that there are constitutional issues concerning the application of collateral estoppel principles which should be considered by any court, or that the Illinois Supreme Court erred by applying Illinois law to determine the collateral estoppel effect of the prior federal judgments. Touche Ross cannot raise these issues for the first time in this forum. The attempt to so raise these issues is made even more untenable by the fact that Touche Ross beseeched the Illinois Supreme Court to ignore any potential constitutional issues and look solely to Illinois substantive law for the proper legal principles to be applied.

The Court's certiorari jurisdiction over decisions from state courts is limited by the principle that, "[i]n reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido, California*, 112 S.Ct. 1522, 1531 (1992). This restriction is known as the "pressed and passed upon below" rule. There are no valid reasons why the Court should abandon this established practice and grant certiorari here.

Early cases unequivocally held no certiorari jurisdiction existed unless a federal question had been both raised and decided in the state court below. *Crowell v.*

Randell, 35 U.S. 368 (1836); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). More recent cases have reaffirmed the validity of these jurisdictional requirements. *Webb v. Webb*, 451 U.S. 493, 496 (1981); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). Only under extenuating circumstances has this Court held the "pressed and passed upon" rule not to be jurisdictional. *Illinois v. Gates*, 462 U.S. 213, 219 (1983) commented that "some cases have treated the so-called 'not pressed or passed upon below' rule as merely a prudential restriction." This issue, however, need not be resolved here since this Court should deny the Petition on both jurisdictional and prudential grounds.

Assuming the "pressed and passed upon below" rule is a jurisdictional requirement, it must function to preclude certiorari. Touche Ross never "pressed" the federal claims identified in the Petition during the state court appellate process, and affirmatively sought to have the Illinois Supreme Court avoid any such issues and apply Illinois collateral estoppel principles. This Court dismissed a writ of certiorari as improvidently granted where a party urged a decision based on a theory which differed from the position taken in the Court of Appeals. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 388 (1978). Touche Ross cannot have a writ granted on a theory which is the polar opposite of the theory it espoused in the courts below.

Touche Ross' reference of potential constitutional implications in the introduction to its Petition for Rehearing in the Illinois Supreme Court does not constitute "pressing" of the issue. The mere mention of constitutional provisions and their potential application, without

citation of cases and exposition of the bases for the federal claim, does not constitute "pressing" of the issue. *Webb*, 451 U.S. at 496-97 (petitioner who used the phrase "full faith and credit" in the state court proceedings, but without ever having cited cases to support a full faith and credit claim failed to raise the issue sufficiently to establish certiorari jurisdiction).

Even if Touche Ross had adequately raised the newly-minted "federal question" in its petition for rehearing, it would still be jurisdictionally insufficient unless the state court actually entertained the petition and ruled on the federal question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). To constitute a reviewable judgment under these circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been considered and denied. *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-34 (1913). There is simply no basis for Touche Ross to claim that it "pressed" any federal questions in the courts below.

It is equally clear that the Illinois Supreme Court never "passed" on the constitutional issues raised by Touche Ross in its Petition for Certiorari. The Illinois Supreme Court's order denying Touche Ross' Petition for Rehearing is silent on the constitutional issues now being asserted by Touche Ross. (App. F-1). There is no mention in any of the state court opinions, either at the trial or appellate levels, suggesting that federal constitutional issue claims were presented, considered or ruled upon. A rare exception to the "pressed and passed upon below" rule may apply where the petitioner is (1) able to show

that the decision of the state's highest court was a surprise *and* (2) demonstrate that the federal question was actually raised in the petition for rehearing but was ignored by the court. *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935). Touche Ross cannot meet either of these burdens. There is no basis for Touche Ross to argue that it took advantage of any of the many opportunities available to it to raise the federal questions now asserted. Equally, it would be fallacious for Touche Ross to argue that the Illinois Supreme Court's application of Illinois collateral estoppel law came as a surprise, since Touche Ross itself requested the application adopted by the Illinois Supreme Court.

That Touche Ross failed to raise in the Illinois state courts the issues it now seeks to be reviewed is further substantiated by its failure to comply with Supreme Court Rule 14.1(h). That Rule requires that:

> If a review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised *so as to give this Court jurisdiction to review the judgment on a writ of certiorari* (emphasis added).

Touche Ross' statement of the case omits mention of any of the jurisdictional facts called for in Rule 14.1(h). The

reason for this omission is clear – having failed to raise the "federal questions sought to be reviewed" at any point in the state court proceedings, Touche Ross is unable to comply with this rule.

Certiorari must also be denied under the less restrictive "prudential" standard applied in a small minority of cases. Principles of comity "require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." *Webb*, 451 U.S. at 499. There are also practical reasons for requiring a federal issue to have been adequately presented in the state-court system before granting certiorari. These reasons include (1) the need to develop the record necessary for Supreme Court review; (2) the desire to provide state courts with the ability to pretermit the federal issues by identifying and acting upon independent and alternate state grounds; and (3) the ability of state courts to handle a larger number of federal claims on appeal, than can the Supreme Court, as well as providing this Court with opinions that may obviate the need for plenary review. *Gates*, 462 U.S. at 221-22; *Webb*, 451 U.S. at 500-01. This case clearly falls within the parameters of the prudential restriction for denying certiorari.

II. The Petition Fails to Raise a Federal Question Worthy of the Court's Plenary Review

The fundamental premises underlying Touche Ross' Petition are that the Illinois Supreme Court's failure to apply federal collateral estoppel law created a reviewable

federal question and that applying such principles in this case would lead to a different result. Those premises are false for a variety reasons. First, there is no split in the decisions of the Circuit Courts relevant to any issue in this case. Second, there is no conflict in the decision of the Illinois Supreme Court and a United States court of appeals on a similar federal question. Third, Illinois collateral estoppel law is more advantageous to Petitioner than federal collateral estoppel law. Thus, if Touche Ross was unable to satisfy the Illinois collateral estoppel rules, federal collateral estoppel law would not mandate a different result. Even if the Court were to overlook the procedural flaws in Touche Ross' Petition, the Petition should still be denied because Touche Ross has failed to demonstrate any basis for reaching a different result on remand. The Illinois Supreme Court correctly determined that collateral estoppel did not bar the Congregation's common law negligence and breach of contract claims against Touche Ross. Touche Ross' request for relief from this Court is not based on the depravation of a vital constitutional right, but rather its failure to obtain a favorable ruling from the Illinois Supreme Court.

A. There is No Split in the Circuits Relevant to this Matter and No Clash Between the Decision of the Illinois Supreme Court and a Federal Circuit Court on a Federal Question

Touche Ross attempts to bring the questions presented in its Petition within the realm of reviewability by claiming both that there is a relevant split in the circuits and by insisting that the decision of the Illinois Supreme Court conflicts with the majority of cases following one branch of that split. These assertions have no merit.

The "split in the circuits" alleged by Touche Ross is both non-existent and irrelevant. First, Supreme Court Rule 10.1(a) has no application here. Supreme Court Rule 10.1(a) states that certiorari may be granted based on a split in the circuits "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . " Here, there is no federal decision even being considered as in error, and therefore no "split" as envisioned by this Rule can exist. Moreover, there weren't "alternative, independent" grounds for the federal court's rulings here, and thus the nuances of federal preclusion law raised by Touche Ross have no application. The only basis for the dismissal of the aiding and abetting claims against Touche Ross was the fact that the federal court found no primary securities law violations. (App. A-12, 13). A simple review of the federal district court and Seventh Circuit opinions on this issue confirms this conclusion was correct. (App. C-6; E-12). Those brief opinions make clear that, contrary to Touche Ross' assertion, there were no "independent, alternative holdings supporting the federal judgment" in its favor on the federal aiding and abetting claim. (Pet. at 22).

Nor did the Illinois Supreme Court rule that it was denying preclusive effect to the federal court's holdings because they were reached in the alternative, as Touche Ross contends. (Pet. at 24). The Illinois Supreme Court never declined to apply collateral estoppel because the alleged federal findings were reached in the alternative. (App. A-10-15). Touche Ross' assertion that the Illinois Supreme Court's decision implicates a split in the federal circuit courts on the issue of whether preclusive effect

must be given to "independent, alternative holdings" (Pet. at 24-27) is completely without merit.

Equally, there is no "state court of last resort [having] decided a federal question in a way that conflicts with the decision of . . . a United States court of appeals" as required by Supreme Court Rule 10.1(b). The Illinois Supreme Court was never asked to and therefore did not make a decision as to any federal questions. It would therefore be impossible to suggest that a reviewable issue exists under this Rule by virtue of anything that was actually decided by the Illinois Supreme Court. Nothing that was actually decided by the Illinois Supreme Court is in conflict with any collateral estoppel decision of a federal court of appeals.

B. Applying the Law as Requested by Touche Ross Would Not Alter the Illinois Supreme Court's Opinion

Review of this matter on certiorari would unnecessarily burden this Court's resources because applying federal common law, as now advocated by Touche Ross, would not alter the Illinois Supreme Court's opinion. Three elements for collateral estoppel application are common to both federal and Illinois law: (1) the issue decided in the prior must be identical with the one presented in the case in question; (2) there must have been a final judgment on the merits; and (3) the party against whom the estoppel is asserted must be a party, or in privity with a party, to the prior adjudication. (App. A-11; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.5 (1979);

Montana v. United States, 440 U.S. 147, 153-55 (1979); *Ballweg v. City of Springfield*, 114 Ill.2d 107, 113, 499 N.E.2d 1373, 1378 (1986).

There has been express recognition by this Court of a fourth element for federal collateral estoppel application: the issue decided in the prior adjudication must have been "necessary" to the decision in that case. *Parklane Hosiery*, 439 U.S. at 326, n.5. Thus, federal law limits collateral estoppel to those identical issues previously decided that were also "necessary" to the decision in the prior adjudication – Illinois law generally applies no such restriction.[6]

In applying collateral estoppel principles, however, the Illinois Supreme Court did apply the fourth federal element in reaching its decision. As the Illinois Supreme Court noted: "The doctrine of collateral estoppel applies only to controlling facts or questions *material* to the determination of both causes." (App. A-12) (emphasis added). In the next sentence of its opinion, the Illinois Supreme Court described this requirement as an inquiry into whether the issues "were *necessary* to the Federal adjudication" (*Id.*) (emphasis added). That is precisely the same standard identified by Touche Ross as the final requirement for federal collateral estoppel. The Illinois Supreme

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[6] The inclusion of this fourth element may account for Touche Ross' reliance upon Illinois law in its arguments to the Illinois courts, and its failure to assert below that the Illinois Supreme Court should have applied federal collateral estoppel principles. Illinois principles were clearly more advantageous to Touche Ross than federal common law.

Court in fact applied the very same principles that Touche Ross claims it should be required to apply under federal common law.

C. The Illinois Supreme Court Correctly Determined That Collateral Estoppel Did Not Bar the State Court Litigation Against Petitioner

The Illinois Supreme Court treated the federal adjudications as having potential collateral estoppel effect. After careful and thoughtful review, the Illinois Supreme Court correctly determined that collateral estoppel did not bar the Congregation's state law claims against Touche Ross. In so ruling, the Illinois Supreme Court first noted that the federal courts had not in fact addressed the merits of the Congregation's state law claims. (App. A-10). The Illinois Supreme Court next carefully considered each of the specific "findings" Touche Ross claimed should collaterally bar the Congregation's state law claims. After thorough review, the Illinois Supreme Court, found that most of the "findings" Touche Ross claimed were made by the federal court were simply not relevant to the state law negligence and breach of contract claims and therefore could not bar these claims. (App. A-12). In its analysis of these "findings", the Illinois Supreme Court described the distinction between the federal securities law claims that were decided by the federal courts and the undecided state law claims. The federal claims related solely to alleged Rule 10b-5 violations by others and Touche Ross' alleged role as an aider and abetter of these violations. The state law claims, by contrast, address the issue of whether Touche Ross could be held primarily liable to the Congregation, based on its

negligence or breach of contract, "for the manner in which [it] recorded the Newell investments in plaintiff's financial report." (*Id.*) The Illinois Supreme Court noted that the Congregation had retained Touche Ross as an "outside specialist" for the purpose of valuing Newell's investments, and that it was Touche Ross's inadequate performance of that outside accounting role that gave rise to the state law claims:

> [P]laintiff retained defendant to value Newell's investments. The district judge acknowledged that plaintiff could obtain review of Newell's investments by an outside specialist, and it is the asserted negligence of the outside specialist retained for that purpose – defendant, Touche Ross – that is at issue here.

(App. A-14).

Touche Ross was not hired to make investments or to recommend them, but to accurately report the value of the investments made by Newell and others. The state court was asked to decide whether Touche Ross made negligent misrepresentations about the value of the securities selected by Newell, or breached its contractual obligations to report those values correctly, and whether such negligence or breach of contract was a proximate cause of the Congregation's injuries. Touche Ross' obligations to value those securities accurately was completely separate from the issues of (i) who made those investment decisions, (ii) the authority the Congregation granted to Newell to make investments, or (iii) Newell's or the Congregation's general knowledge of the particular transactions or the Congregation's ability to track the paper flow generated by Newell and the dealers. The

Illinois Supreme Court therefore correctly determined that the federal findings as to Newell and his relationship with the Congregation were not relevant to the different issues raised by the state law claims against the accountants. (App. A-12).

As to other "findings" claimed by Touche Ross as having been made by the federal courts, the Illinois Supreme Court correctly determined that they had not actually been made by the federal courts. (App. A-12). For example, Touche Ross asserted before the Illinois Supreme Court, as it has here, that the federal courts determined that "Touche Ross had made no misrepresentations to the Congregation" and "that Touche Ross and the Congregation had agreed that the arbitrage investments would be reported at cost." (See e.g. Pet. at 22). In fact, as we have seen, no such findings were ever made by the federal courts. The Illinois Supreme Court got it right when it found that these and other purported findings were not "actually decided in the Federal adjudication" or were "clearly taken out of context when applied to plaintiff's relationship with defendant." (App. A-12,15). Not having been actually decided, these and other alleged findings could not have been "necessary" to the federal court judgments, and were not entitled to collateral estoppel effect. (App. A-12,13). The conclusion of the Illinois Supreme Court as to the collateral estoppel effect, or lack thereof, of the prior federal adjudication was correct under either federal or state collateral estoppel law principles.

CONCLUSION

For the reasons set forth herein, the Congregation requests that the Petition be denied.

Respectfully submitted,

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